Supreme Court, U.S.
FILED

991304 JAN 29 2000

No. _____

In The Supreme Court of the United States

ANTONIA M. ALLEN-SESKER, *et al.*,

Petitioners,

v.

BELL ATLANTIC GLOBAL WIRELESS, INC. t/a/ Chesapeake Directory Sales Company, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should Federal Rule of Civil Procedure 56(f) be liberally construed to permit additional discovery before plaintiffs to a civil rights action alleging racial discrimination in employment termination respond to defendants' summary judgment motion, particularly where plaintiffs have demonstrated by affidavit that additional discovery would be crucial to an effective response and where the history of the case reveals defendants' obstructionist tactics regarding discovery?

PARTIES TO THE PROCEEDING

Including the parties named in the caption of this Petition, the Petitioners (Plaintiffs and Appellants below) are:

Antonia Allen-Sesker, Jacqueline Coleman, Charmaine Crawford-Holly, Belinda Dickens-Long, Tyo Hodgins, Barbara Lambright, Varnetta Moses, Gloria Real, Andri Stewart, Geraldine Stancil, Carol Willis, and Cassandra Grier. With the exception of one employee who is Hispanic, all of the Petitioners are African American.

Including the parties named in the caption of this Petition, the Respondents (Defendants and Appellees below) are:

Bell Atlantic Global Wireless Incorporated, trading as Chesapeake Directory Sales Company; GTEX Corporation, Barry Van Ry (individually and as President and CEO), Stanley Haas, James R. Wallis (individually and as Vice Presidents of Human Resources), and E. Joseph Crosney (Director of Operations).

Petitioners and Respondents so listed were the parties in the proceedings in the District Court and before the United States Circuit Court of Appeals.

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1999

ANTONIA M. ALLEN-SESKER, *et al.*,
Petitioners,

V.

BELL ATLANTIC GLOBAL WIRELESS, INC.
t/a Chesapeake Directory Sales Company, *et al.*
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioners Antonia M. Allen-Sesker, et al., by their counsel ("Petitioners" or "Appellants"), and proceeding under applicable Rules of this Court, respectfully request that a writ of certiorari be issued to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The per curiam opinion of the United States Court of Appeals for the Fourth Circuit, issued November 2, 1999, is not published but can be found at 1999 WL 991436. (Appendix F, App. at 20a).

The memorandum opinion of the United States District Court for the District of Maryland, issued March 24, 1999, and granting summary judgment to Respondents, is not published. (Appendix E, App. at 9a).

The order of the United States District Court for the District of Maryland issued July 2, 1998, affirming the denial of certain discovery motions by the Magistrate Judge, is not published. (Appendix D, App. at 8a).

The decisions and orders of the Magistrate Judge as to scheduling and discovery matters directly affecting the issues in this Petition, are not published. (Appendix C, App. 6a; Appendix B., App. at 3a, and Appendix A., App. at 1a).

STATEMENT OF JURISDICTION

This is a civil rights action alleging racial discrimination in employment termination. Jurisdiction of the District Court was invoked chiefly through 28 U.S.C. §1343(4), 28 U.S.C. §1981, 28 U.S.C. §2000e-2 et seq., and 29 U.S.C. §1391(b).

Following the grant of summary judgment and entry of final judgment by the District Court, on or about March 23, 1999, Petitioners filed a timely appeal to the United States Court of Appeals for the Fourth Circuit on April 21, 1999. An amended notice of appeal was filed on April 30, 1999. No post judgment motions were filed. Jurisdiction before the Circuit Court of Appeals was based chiefly on 28 U.S.C. §1291.

The unpublished, per curiam opinion of the United States Court of Appeals for the Fourth Circuit was issued on November 2, 1999. No motion for reconsideration or reconsideration en banc was filed. This Petition is submitted within 90 days of the date of the Fourth Circuit Opinion. Supreme Court Rule 13.1.

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Federal Rule of Civil Procedure Rule 56 [relevant portions]:

> **(e) Form of Affidavits; Further Testimony; Defense Required**. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein... When a motion for summary judgment is made and supported as provided by this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.
>
> **(f) When Affidavits Unavailable**. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

STATEMENT OF THE CASE

A. Summary of Factual Background/Allegations

As was reviewed generally by the District Court in its Memorandum Opinion and as is more fully described and alleged in the Amended Complaint before the District Court, Bell Atlantic Global Wireless, Inc. and GTEX Corporation are principal entities in a company called the Chesapeake Directory Sales Company ("CDSC"). CDSC is headquartered in Greenbelt, Maryland, and sells and processes the advertisements found in Bell Atlantic's "Yellow Pages."

Petitioners were among the approximately 120 Sales Production Coordinators ("SPC's") who worked in CDSC's Sales Production Department. Working out of headquarters, SPC's were responsible for processing the advertising contracts obtained by the sales personnel in CDSC's eight regional Divisions.

In 1995, CDSC decided to disband the Sales Production Department, transferring the administrative responsibilities of the SPC's to the newly-created positions at each of the eight regional Divisions. CDSC planned to eliminate the SPC positions completely by August 1997. This necessarily would result in numerous current SPC's losing their jobs. Their only hope to maintain their jobs at CDSC would be to apply for new Account Quality Representative ("AQR") positions at the Divisions. However, not all SPC's would be so hired.

By May, 1997, the transfer of the SPC's responsibilities to the Divisions was completed, but 21 of the original 120 Sales Production employees had not yet received new jobs. These employees were subsequently informed that their positions would be terminated as of August 15, 1997 and that they would be eligible for benefits pursuant to CDSC's Separation Pay Plan *if they agreed to sign a release of claims*. Not coincidentally, the 21 SPC's who would be terminated were chiefly African American. It was plain even before the position-transfer process was completed, as part of the consistent hiring and firing practices at CDSC, that CDSC was also seeking to reduce the number of African Americans on its workforce. It also was plain that the release CDSC was insisting be signed by the terminated employees in order for them to receive separation pay benefits, would shield the company from the open and outrageous discrimination perpetrated against them. Petitioners, who comprised 12 of these 21 employees, declined the offer.

In their multi-Count Amended Complaint filed on

November 7, 1997, Petitioners detailed a wide ranging practice of racial discrimination at CDSC, designed to prevent African Americans and Hispanics from occupying preferred positions. The Complaint alleged, "Since the day it was founded, CDSC has never permitted African Americans to be placed in good-paying positions or high level management jobs." Attached was CDSC's "Portrait Book" revealing that there are NO Black executives at CDSC. The executive support staff is also all-White.

In CDSC company areas, minorities were woefully underrepresented. The Complaint notes the figures as:

marketing (11 Whites to 3 Blacks),
Baltimore East (29 Whites to 2 Blacks),
Baltimore West (27 Whites to 4 Blacks),
Richmond (37 Whites to 1 Black),
Charleston (21 Whites to 0 Blacks),
Rockville (31 Whites to 7 Blacks),
D.C. Metro (30 Whites to 7 Blacks),
Virginia/NC (35 Whites to 1 Black),
Norfolk (32 Whites to 2 Blacks),
accounting (7 Whites to 2 Blacks),
facilities (8 Whites to 3 Blacks),
information management (14 Whites to 5 Blacks),
training and development (7 Whites to 1 Black),
DART/New Ventures (5 Whites to 0 Blacks),
auditing (2 Whites to 0 Blacks), and
centralized sales operations (9 Whites to 4 Blacks).

The result, from CDSC's own salary tables, is that a White employee can earn $28,000 to $42,000, but that an African American employee with comparable training and experience is earning only $21,000 to $31,400. Petitioners alleged that sales coordinators who are African American are treated like second class citizens and are generally not permitted to advance. Without

a single exception, Petitioners were given fewer opportunities for training and promotions than their White counterparts. Each of the Petitioners applied for several positions to move up within CDSC, and never were able to do so. Each Petitioner demanded an opportunity to advance to a better position than the position that person has held for years, to no avail. Denials of promotions were never accompanied by sufficient or legitimate reasons. One of the Petitioners actually trained the White employee who held a higher position than she did.

Petitioners alleged retaliatory actions taken against them by CDSC executives when they protested CDSC policies and actions. They alleged that CDSC deliberately planned to eliminate 38 positions held mostly by African-Americans and for purely discriminatory reasons. Respondents offered these employees new jobs and promised them proper training.

Petitioners were told that they would be permitted to apply for the new "protected positions." However, White employees were not even required to apply for the same positions and were automatically selected for them. Yet Petitioners were put through a discriminatory process and were not selected. In fact, *every* White employee in CDSC's departments received a position and will remain with CDSC.

Petitioners alleged that they were specifically targeted for purported layoffs which CDSC used to get rid of them, for racially motivated reasons. To make the appearance of the layoffs legitimate, CDSC began to falsely evaluate the Petitioners, in a process which was deliberately demeaning. When they protested this treatment, Petitioners were subjected to various retaliations at CDSC before eventually being terminated, including slow work assignments and refusals to provide medical coverage.

Petitioners alleged that CDSC has engaged in a pattern of employment discrimination based on race. In addition to

alleging that CDSC denied its African American and Hispanic employees equal wages, adequate training and equal opportunity for promotions, they contended that their positions were terminated not because of any necessary reorganization but for purely racially discriminatory reasons. The District Court recited that when Plaintiffs complained about the discriminatory treatment, CDSC purportedly retaliated against them by refusing to provide them with medical coverage. [See App. at 11a].

B. Discovery Issues

From the outset of the litigation initiated by Petitioners and arising from these discriminatory employment practices, discovery conflicts were manufactured or compounded by Respondents' recalcitrance, uncooperative communications, and obstructive tactics. This process culminated in the fact that even though Respondents had not appropriately answered Petitioners' request for production of documents or request for admissions, Respondents filed, on or about May 4, 1998, a motion for summary judgment. In their request for documents, Petitioners sought documents in areas of data and databases, racial composition of the workforce, promotions and transfers, personnel files in the sales divisions, personnel files for all APS affected employees, and organizational charts and handbooks. CDSC withheld all of these documents, which could have been used to determine the discriminatory practices of CDSC and the discriminatory treatment of, or impact upon, African Americans brought about by CDSC's purported reduction in force.

In addition to the request for documents and requests for admissions, Petitioners also sought substantial information by way of interrogatories. Yet numerous detailed interrogatories by Petitioners to Respondents were answered inadequately by Respondents, including information as to background of other discrimination complaints, the qualifications for all hired

individuals, identification of various Human Resources Department documents, identification of all employment applications for the relevant time period, and testing and selection criteria for CDSC employees for the relevant time period.

None of this information ever was disclosed by Respondents. In many instances, Respondents provided incomplete information in order to launch an attack on the use of any evidence by Petitioners. Respondents did disclose voluminous documents, more than 50,000 pages (as the District Court noted in its Memorandum Opinion granting summary judgment to Respondents), but these collections of paper were nothing more than personnel files for various unidentified individuals. There was no road map supplied for the review of this mass of material. For the most part, these documents were useless and irrelevant.

Despite this utter failure of adequate discovery, Petitioner's expert economist was able to infer, from the hiring and termination pattern at CDSC, that of the 32 involuntary terminations at CDSC, 27, or 84.4%, were African American. The expert stated that based on statistical review, such a pattern represented a disparity of 6.62 standard deviations. However, the expert noted that additional information would be crucial to verify these conclusions and to further review CDSC's hiring and firing practices, in order to further establish Petitioners' case.

Motions to compel submitted by Petitioners regarding these discovery issues were denied by the District Court (Magistrate Judge) as untimely. This denial eventually was affirmed. Yet it was evident that CDSC was denying to Petitioners enormous amounts of discovery vital to Petitioners' meeting their significant burden of showing racial discrimination in hiring and firing at CDSC and essential to Petitioners' appropriate response to Respondents' summary judgment motion.

The urgency of the issues and the effect of Respondents'

actions upon Petitioners (one of whom has a serious medical condition), such as threatening the cessation of medical benefits, were underscored by Petitioners' two attempts to enjoin Respondents' conduct against them. Both emergency motions for injunctive relief were unopposed, yet both were denied.

Nevertheless, Petitioners continued to treat this matter with persistence and gravity, and were diligent in their pursuit of proper discovery. Appellants served CDSC with interrogatories a mere 18 days after the District Court issued its Scheduling Order of December 5, 1997 (setting a discovery deadline of April 2, 1998). CDSC's answers were deficient and misleading. Yet Petitioners' motion to compel was denied.

In the same vein, after Petitioners served Respondents with requests for production of documents, one day after the discovery deadline Petitioners received a response without any documents. Several days later, Petitioners were allowed to review the documents Respondents would release, which was the huge volume of mismatched individual personnel files that had been significantly redacted.

Further, Petitioners served Respondents with requests for admissions on April 9, 1998. Rule 36(a) mandates that responses be deemed admitted if not tendered in 30 days. *More* than 30 days later, on May 14, 1998, Respondents replied with late and incomplete answers. Yet the District Court turned away Petitioners' efforts to determine the sufficiency of the responses and thus whether requested admissions are deemed admitted.

To Petitioners' interrogatory questions, document production requests, or requests for admissions, Respondents' obstructionist tactics included persistent contentions that the queries were vague or sought privileged information or were not relevant. Beyond question, Respondents' sluggish and incomplete discovery conduct was designed only to thwart, frustrate, and

obstruct the proper advancement of this litigation.

As noted, in the meantime, on May 4, 1998, Respondents submitted their motion for summary judgment. By telephone conference with the Magistrate Judge as to scheduling, Petitioners requested and received an extension until June 1, 1998 to respond to this motion. It was to be an empty extension.

It was evident that an appropriate response could not be submitted in the present state of discovery. Thus, although the discovery deadline had passed, Petitioners submitted on May 22, 1998, three crucial discovery motions: a motion to compel as to the interrogatories, a motion to compel and for sanctions as to the document production requests, and a motion to determine the sufficiency of the responses to requests for admissions.

At the same time, Petitioners filed a Motion to Refuse Defendants' Application for Summary Judgment Or, in the Alternative, Motion for Continuance. This motion was submitted under Rule 56(f) and was accompanied by a 56(f) affidavit declaring that discovery matters were at issue and that further discovery was necessary to oppose the summary judgment motion. No other substantive response to the summary judgment motion was filed, since as the Rule 56(f) motion described, no such substantive response was possible.

In the telephone conference with Magistrate Judge William Connelly, Petitioners explained their approach to the present procedural situation and the importance of their discovery motions. They also explained that they could not respond to the summary judgment motion in a substantive way.

Yet, on May 29, 1998, Magistrate Connelly denied all three of Petitioners' discovery motions, deeming them untimely. [App. 1a et seq.]. Petitioners filed a second Rule 56(f) affidavit asserting that, absent discovery sought by the motions, summary judgment could not be effectively opposed. Petitioners also filed

objections to the District Court, concerning Magistrate Judge Connellys' May 29, 1998 Order denying the discovery motions.

On July 2, 1998, in a one-page order, the District Court (Messite, J.) affirmed the Magistrate Judge's decisions denying the discovery motions. [App. 8a]. The Court did not explain its rationale for its conclusion that the Magistrate Judge's decision was not clearly erroneous and not contrary to law.

C. Summary Judgment Granted

Approximately eight months later, on March 23, 1998, the District Court (Messitte, J.) granted CDSC's summary judgment motion. The Court stated [see App. 15a-App. 16a]:

> Plaintiffs contend that Defendants' refusal to cooperate with discovery has prejudiced their ability to respond to the Motion for Summary Judgment. In their Motion for Continuance, they argue that Defendants failed to respond to "numerous requests for production of documents and Requests for Admissions which are crucial in Plaintiffs' preparation for an adequate response to Defendants' Summary Judgment." An affidavit submitted by Plaintiffs' counsel and attached to the Motion for Continuance states that "Defendants have outstanding discovery documents that are critical to Plaintiffs' Opposition to Defendants' Motion for Summary Judgment." Another affidavit--styled as a "Rule 56(f) Declaration" and attached to Plaintiff's Opposition--refers to Defendants' refusal to disclose "important discovery."
>
> None of the allegations made by Plaintiffs, however, "point to any specific facts that [they have] yet to discover." Finzel [v. Mazda Motor of America, No. 98-1230, 1999 WL 12934 (4th Cir. Jan. 14, 1999)], 1999 WL 12934 at *3. This omission is fatal to Plaintiffs' argument. The Fourth Circuit has made pellucidly clear that a party employing Rule 56(f) to avoid summary

judgment "may not simply rely on vague assertions that additional discovery will produce needed, but unspecified, facts." Id. at *2. (citing Nguyen v. CNA Corp, 44 F.3d 234, 242 (4th Cir. 1995); Sachs Corp. of U.S.A. v. United Virginia Bank, 97 F.R.D. 504 (E.D.Va. 1983) ("[F]urther discovery, although permitted in appropriate cases under Rule 56(f), is unwarranted...where it is clear that it would not be directed at filling a specific evidentiary gap, but rather would consist of blind groping..."). Despite being given more than ample time to do so, Plaintiffs have failed to identify with any degree of specificity the facts which are allegedly so crucial to their case.

When they obtained an extension from Judge Connelly, Plaintiffs were explicitly warned that no further extensions would be allowed. After granting their Motion for Extension on May 22, 1998, Judge Connelly warned Plaintiffs to file an opposition to Defendants' motion by June 1, 1998. Judge Connelly made particular note of the fact that Plaintiffs' efforts to compel production of the alleged outstanding discovery were potentially fruitless, given the untimeliness of any motion to compel. From these bright red flags, Plaintiffs were unquestionably on notice that any failure to file a substantive opposition would be at their peril. Yet they failed to file. Indeed, in surprising disregard of Judge Connelly's order, Plaintiff proceeded to file three discovery motions which were ultimately denied by him on May 29, 1998. Even then, Plaintiffs' counsel had three days remaining until the June 1st deadline to prepare an opposition, but refused to act. While Plaintiffs may have believed that Judge Connelly's rulings were erroneous, by far the more prudent course would have been for Plaintiffs to prepare for the possibility that Judge Connelly's rulings would be affirmed--which indeed they have been.

Therefore, because somehow Petitioners had not provided sufficient detail in three discovery motions and two 56(f) affidavits and because they did not substantively respond to the summary judgment motion when they repeatedly stated that they could not, given Respondents' obstructionist discovery tactics, summary judgment was granted. A final order was entered.

Petitioners appealed to the United States Court of Appeals for the Fourth Circuit. In an unpublished per curiam opinion with scant discussion, the Fourth Circuit affirmed. [App. 20a-App. 21a]. The Fourth Circuit simply stated, "In light of the Appellants' failure to describe with any specificity the additional discovery required, we find that the district court did not abuse its discretion in denying the Rule 56(f) motion. See Nguyen v. CNA Corp., 44 F.3d 234, 242 (4th Cir. 1995)."

REASONS FOR GRANTING WRIT

RULE 56(f) SHOULD BE PROPERLY EMPLOYED BY FEDERAL COURTS TO PRECLUDE SUMMARY JUDGMENT WHEN IT IS EVIDENT THAT THE NON-MOVING PARTY DOES NOT HAVE ESSENTIAL DISCOVERY MATERIAL TO RESPOND TO THE MOTION AND WHERE THE MOVING PARTY WOULD NOT BE PREJUDICED BY CONTINUANCE TO COMPLETE DISCOVERY

Petitioners point out that the summary judgment process is not a means to relieve defendants, particularly in civil rights or employment discrimination litigation, from the burdens of litigation. This Court has made it clear that summary judgment is appropriate only after there has been adequate time for discovery. Celotex Corporation v. Catrett, 477 U.S. 317 (1986). This Court also has stated flatly that summary judgment may be refused "where the nonmoving party has not had the opportunity to discover information that is essential to his opposition."

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) at 250 n. 5. Federal Rule 56(f) expressly permits a court to deny summary judgment, or to order a continuance, if the nonmovant shows through affidavits that it cannot properly oppose the summary judgment without a chance to conduct discovery.

As Petitioners stated before the Fourth Circuit, the investigations, depositions, and other limited discovery which they were able to conduct provided ample reason to conclude that CDSC discriminates against African Americans in its employment practices. The Petitioner's forensic expert noted that the racial pattern is discriminatory to the extent of six standard deviations in a statistical model, but also said that further information was necessary to provide the basis for a proper expert determination. The problem is that the evidence as to this discrimination is in the possession or control of CDSC.

Pattern and practice evidence is essential to prove disparate treatment, absent direct evidence of intent. Petitioners have a burden which is often onerous for plaintiffs in discrimination cases, especially when faced with summary judgment. In a wide ranging pattern of discrimination covering years and involving multiple plaintiffs, considerable relevant and intelligible documentation must be amassed. By permitting Respondents to thwart the discovery process with impunity, the Court precluded Petitioners from producing a showing of anything more than a scintilla of disparate treatment. This violated both the letter and the spirit of Rule 56(f).

This Court has noted that plaintiffs in discrimination cases under Title VII and §1981 must prove discriminatory intent through the use of circumstantial evidence. United States Postal Board of Governors v. Aikens, 460 U.S. 711 (1983). Such circumstantial evidence is often presented through the use of statistics, which are in turn based on substantial data. Griggs v.

Duke Power Co., 401 U.S. 424 (1971). As stated in Alabama v. United States, 304 F.2d 583 (5th Cir. 1962), affirmed, 371 U.S. 37, "in the problem of racial discrimination, statistics often tell much, and Courts listen."

Thus, disparate treatment plaintiffs "often must build their cases from pieces of circumstantial evidence which cumulatively undercut the credibility of the various explanations of the employer." Hollander v. American Cyanamid, 895 F.2d 80 (2nd Cir. 1980). Clever employers "may easily conceal their motivations." United States v. City of Black Jack, Missouri, 508 F.2d 1179 (8th Cir. 1974), *cert. denied* 422 U.S. 1042

Naturally, there must be sufficient basis under Rule 56(f) for a district court to refuse summary judgment or order a continuance to permit further discovery. As stated in Duke v. University of Texas at El Paso, 729 F.2d 994 (5th Cir. 1984), the record should reflect that discovery be based on more than a "fanciful hope" of counsel. That standard clearly was met here.

By the same token, such action should be taken when the trial court has been made aware of the need for more complete discovery from a moving party and that this discovery may lead to evidence that would generate a genuine dispute of fact. See Sperling v. Hoffman-LaRoche, Inc., 118 F.R.D. 392 (D. N.J. 1988); First Chicago Intern. v. United Exchange Co., Ltd., 836 F.2d 1375 (D.C. Cir. 1988); Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438 (2nd Cir. 1980); Glen Eden Hospital v. Blue Shield of Michigan, 740 F.2d 423 (6th Cir. 1984); Palmer v. Tracor, 856 F.2d 1131 (8th Cir. 1988); Visa International Service v. Bankcard Holders, 784 F.2d 1472 (9th Cir. 1986), and Snook v. Trust Co. of Georgia Bank of Savannah, 859 F.2d 865 (11th Cir. 1988).

This situation is particularly plain in disparate treatment situations. Cedillo v. International Association of Bridge &

Structural Iron Workers, Local No. 1, 603 F.2d 7 (7th Cir. 1979), at 12 (holding summary judgment is improper in disparate treatment cases when district court limited plaintiff's ability to discover information relevant to the employer's motivation), and Diaz v. American Telephone and Telegraph, 752 F.2d 1356 (9th Cir. 1985) (holding summary judgment to be "patently inappropriate" when district court restricts plaintiff's ability to discover evidence necessary to establish *prima facie* disparate treatment case).

The District Court and the Fourth Circuit assumed that the number of documents already produced by Respondents (50,000 pages) constitutes a sufficient response. Yet the presentation of volumes of paper is not necessarily compliance with specific interrogatories and requests for document production. Also, taking of various depositions of some of CDSC's present and former employees cannot alone be the basis for establishing a pattern and practice of disparate treatment. This is the case where, as here, Respondents obstructed the conduct of depositions, and many deponents expressed certain memory failures on significant issues. Given that statistics are often employed in these instances, by circumscribing written discovery CDSC precluded Petitioners from producing accurate statistics based upon a sufficiently large data pool, along with withholding evidence Appellants strategically planned to use in opposing the summary judgment motion.

It was manifest that Petitioners could not respond to the summary judgment motion in the short time allowed in the extension granted by Magistrate Judge Connelly, from May 22 to June 1, without the discovery described in the 56(f) affidavit filed with their motion seeking that the summary judgment be refused or the case continued. Although Magistrate Judge Connelly denied all three of the discovery motions as untimely, at least two

of the motions could not have been filed within the discovery deadline since the responses to which they were directed were not themselves submitted until after that deadline.

Nor did Petitioners fail to identify with specificity the additional discovery required. Petitioners' Rule 56(f) affidavit accompanying its motion to refuse summary judgment or for a continuance referred to the motion itself and reiterated that Respondents "have outstanding discovery documents that are critical to" Petitioners' opposition to the summary judgment motion. That motion itself detailed that discovery requests such as requests for production of documents, interrogatories, and requests for admissions, had not been adequately answered.

Petitioners' motions to compel were exhaustively specific. The motion to compel as to interrogatory answers takes up 63 pages. The motion to compel and for sanctions directed at issues of document production was painstakingly prepared, takes up 18 pages of general motion noting general objections and was accompanied by various attachments noting precisely detailed specific objections as to various individual Respondents. Those attachments together take up 150 pages. The motion to determine the sufficiency of the responses to requests to admissions was itself a detailed motion, accompanied by a six-page memorandum, and attachments.

The District Court Magistrate Judge had before him the motion and Rule 56(f) affidavit, as well as the motions to compel, but yet gave Petitioners' a mere 10-day extension to respond to the summary judgment motion. Then the Magistrate Judge denied all three motions to compel.

The District Court, in affirming that determination and in subsequently granting summary judgment, stated that Petitioners had committed a "fatal" error in supposedly failing in the affidavit to their 56(f) motion, to "point to any specific facts that

[they have] yet to discover." The District Court stated that the Fourth Circuit "has made pellucidly clear that a party employing Rule 56(f) to avoid summary judgment 'may not simply rely on vague assertions that additional discovery will produce needed, but unspecified, facts.'" (Noting, e.g., Nguyen v. CNA Corp, 44 F.3d 234, 242 (4th Cir. 1995), and Sachs Corp. of U.S.A. v. United Virginia Bank, 97 F.R.D. 504 (E.D.Va. 1983)). The District Court declared that Respondents had "ample time" but "failed to identify with any degree of specificity" the additional discovery required. The Fourth Circuit summarily affirmed.

Apparently, this determination is intended to set a standard for litigants proceeding under Rule 56(f) in the Fourth Circuit and in any other Circuits similarly relying upon this standard, *that the entire sum and substance of the discovery objections and the entire list of additional discovery material sought must appear in the Rule 56(f) affidavit.* This standard is inappropriate and also does not comport with the letter or the spirit of Rule 56(f). Given the exhaustive review of the state of discovery detailed in the three motions to compel, given that the motions were referred to in the Rule 56(f) motion and affidavit, it would only be proper for a court considering a Rule 56(f) motion to review the documentation as a whole. So long as the affidavit is sufficiently clear that the moving party is not on a fishing expedition and that the discovery sought is not "blind groping" (see District Court opinion citing Sachs, supra, at App. at 15a), the Rule 56(f) motion should not be denied merely because the affidavit is not "sufficiently specific." There could not possibly be any more detail supplied by Petitioners concerning the discovery issues at hand, than was supplied by the extensive and thorough motions to compel. To suggest that this level of detail also is necessary in a Rule 56(f) affidavit, accompanying a Rule 56(f) motion which refers to the

contemporaneously filed discovery motions, would be to turn the Rule and the discovery process on its head.

Thus, the District Court did more than abuse its discretion in affirming the Magistrate Judge's denial of the discovery motions and in granting summary judgment because of any lack of specificity in the Rule 56(f) affidavit. The District Court also violated the intent of Rule 56(f) and of the discovery process under the Federal Rules. See Communities for Equity v. Michigan High School Athletic Association, 26 F.Supp.2d 1001 (W.D.Mich. 1998) (female high school student athletes wre entitled to discovery before being required to respond to state high school athletic association's summary judgment motion on Title IX counts of civil rights action, in that summary judgment motion contended that association did not receive federal funding and otherwise did not come under Title IX but plaintiffs had not had adequate opportunity to inquire as to facts related to that contention). This Court has indicated the importance of discovery in such cases. See Hoffman-La Roche, Inc. v. Sperling, 493 U.S. 165 (1998) (names and addresses of discharged employees were subject to discovery in that the discovery "was relevant to the subject matter of the action" and "there were no grounds to limit the discovery under the facts and circumstances of this case.").

The Federal Rules of Civil Procedure require liberal discovery and disclosure is the touchstone of the Rules. Beller v. Credit Alliance Corporation, 106 F.R.D. 557 (N.D. Ga. 1985) and also Jayne A. Lee, Inc. v. Flagstaff Industries Corp., 173 F.R.D. 651 (D.Md. 1997). Neither the Magistrate Judge nor the District Court gave any serious consideration to the motions to compel, the Magistrate Judge denying all of them as supposedly untimely, merely a week after they were filed. Nor did the Magistrate Judge consider, if timeliness was an issue, whether the late-filed responses to requests for admissions constituted such a

delay that the requested admissions would be deemed admitted. Apparently, the Magistrate Judge in finding the motions to compel untimely did not take note of the fact that they could not have been timely given that the responses to which the motions were directed, themselves were supplied outside the deadline.

Instead, the Magistrate Judge and the District Court applied a mechanical interpretation of Local Rules to declare the motions to compel untimely, thus eliminating all hope of Respondents submitting an adequate response to the summary judgment motion. Compounding the error or abuse of discretion, the District Court decided that the Rule 56(f) affidavit apparently is to be considered in a vacuum, and further determined that it was not "specific" enough to warrant consideration. Petitioners having been thwarted at every turn, it was a simple matter to find that they had not substantively responded to the summary judgment motion and thus rule that the motion should be granted.

This Court has an overriding interest in the appropriate interpretation and application of Federal Rules, particularly the discovery process under those Rules. This Court also should be particularly concerned with the appropriate and fair disposition of employment discrimination litigation under statutes designed to protect individuals' civil rights. Defendant corporations in such litigation should not be permitted to engage in discovery shell games and to enlist the aid of the courts in dispensing with such litigation through summary judgment when it is obvious that the defendant corporation has not provided the plaintiffs with sufficient discovery to permit an adequate response. Nor should the summary judgment process be thus contorted. Rule 56(f) was designed to address such contingencies. This Court therefore should review this matter to reiterate and clarify the standards for summary judgment and to delineate the manner in which a Rule 56(f) motion and affidavit is to be considered.

CONCLUSION

Major litigation surrounding blatant racially motivated conduct by Respondents toward Petitioners was cast upon the shoals of Respondents' truncated discovery responses. Such behavior by defendants in a civil rights case was rewarded summary judgment to which these defendants were not entitled and which was not sufficiently opposed by Petitioners because Respondents refused to cooperate in discovery and provide the information properly to oppose it. Defendants in such litigation should not hold the keys to its disposition in this manner.

Rule 56(f) standards were ignored while the Magistrate Judge and the District Court were more concerned that Petitioners' three discovery motions were filed outside the discovery deadline, even though it was evident that in at least one instance Respondents' discovery responses were also outside the deadline.

Twelve former employees of CDSC were denied their civil rights by discriminatory terminations and retaliations. Petitioners are left with no recourse while Respondents were only required to litigate discovery concerning this case rather than its merits.

This Court thus should grant this writ to review the decisions of the Fourth Circuit and of the District Court in this situation, to set a clear standard on the application of Rule 56(f) particularly in disparate treatment and employment discrimination situations, and to ensure that a defendant employer seeking summary judgment will not be rewarded by denying the very evidence necessary to an effective response to that motion.

Accordingly, Petitioners respectfully request that the petition for a writ of certiorari be granted.

RESPECTFULLY SUBMITTED,

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Counsel for Petitioners

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
District of Maryland

Wendy A. Cartwright, Esquire
John W. Hermina, Esquire
Laurel Lakes Executive Park
8327 Cherry Lane
Laurel, Maryland 20707

Vincent H. Cohen, Esquire
Harry T. Jones, Esquire
William P. Flanagan, Esquire
Lily M. Garcia, Esquire
Hogan and Hartson
555 Thirteenth Street, N.W.
Washington, D.C. 20004

Re: Allen-Sesker v. Bell Atlantic Enterprises, Int'l, Inc.
Civil Action No. PJM-97-2820

Dear Counsel:

As you are aware, this case was referred to my chambers for the resolution of all discovery disputes. See 28 U.S.C. §636(b). On May 21, 1998, the undersigned was orally instructed to resolve the Plaintiffs' Motion for Extension to Respond to Defendants' Motion for Summary Judgment. Plaintiffs' Opposition to the Defendants' Motion for Summary Judgment was to be filed on or before May 21, 1998.

On May 22, 1998, a conference call was held with regard to the pending motion. Wendy A. Cartwright and George W. Hermina, Esquire participated in the conference call on behalf of the Plaintiffs. William P. Flanagan argued the motion for

Defendants. The undersigned has considered the parties' arguments and will GRANT the Plaintiffs' motion. Plaintiffs shall file their Opposition on or before June 1, 1998. No further extensions will be granted.[1]

Despite the informal nature of this letter, it is an Order of this Court and will be docketed as such.

Sincerely,

/s/
William Connelly
United States Magistrate Judge

---

[1] At the time of the conference call, Ms. Cartwright indicated that she was unable to respond to the Defendants' Motion for Summary Judgment because she had not yet received all requested discovery from the Defendants. However, in this case, the discovery deadline was April 2, 1998. Shortly before that deadline, Defendants produced approximately 50,000 pages of documents in response to Plaintiffs' discovery requests. Plaintiffs then served Defendants with a Motion to Compel, in accordance with Local Rule 104.7 (D.Md.). Defendants served Plaintiffs with their Opposition, and Plaintiffs briefed a Reply. However, Plaintiffs never filed the fully briefed motion with the Court, and thus have not fully complied with Local Rule 104.7.

At today's conference call, Plaintiffs argued that because they had requested the discovery prior to the discovery deadline, that they should be permitted to file a Motion to Compel with regard to the items that they have not received. Although Plaintiffs are welcome to file a motion, the Court will direct counsels' attention to Local Rule 104.3, which provides that *no discovery deadlines will be extended* because written requests remain unanswered at its expiration (emphasis added).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Southern Division

Antonia M. Allen-Sesker, et al.,	*	
Plaintiffs	*	
v.	*	Civil Action No. PJM-97-2820
Bell Atlantic Enterprises International, Inc., et al.,	*	
Defendants	*	

MEMORANDUM OPINION

By Order of Reference dated April 21, 1998, this case was referred to the undersigned Magistrate Judge for the resolution of all discovery disputes. See 28 U.S.C. §636(b). Pending before the Court are three motions filed by the Plaintiff on May 22, 1998: Plaintiffs' Motion to Determine the Sufficiency of Defendant's Responses to Requests for Admission [Paper No. 39]; Motion to Compel Discovery [Paper No. 40]; and Motion to Compel and for Sanctions [Paper No. 43]. No hearing is deemed necessary. See Local Rule 105.6 (D. Md.). For the reasons which follow, all three motions will be DENIED.

A review of the pertinent docket entries yields the following procedural history of this case:

1.	8/15/97	Complaint filed.
2.	12/5/97	Scheduling Order entered.
3.	3/9/98	Plaintiffs' Request for Continuance of Hearing Date

4.	4/2/98	Discovery Deadline
5.	4/13/98	Plaintiffs' Request for Limited Extension Re: Deposition of Fact Witnesses; Deposition of Expert Witnesses.
6.	5/4/98	Defendant's Motion for Summary Judgment filed
7.	5/15/98	Plaintiffs' Motion to Extend Time (re: filing deadline for Plaintiffs' Opposition to Defendants' Motion for Summary Judgment) filed
8.	5/21/95	Filing Deadline for Plaintiff's Opposition to Defendant's Motion for Summary Judgment
9.	5/21/95	Deadline extended in telephone conference call with undersigned to June 1, 1998 with admonition that no additional extension will be granted.
10.	5/22/98	Plaintiff's Motion to Determine Sufficiency of Defendant's Responses to Requests for Admission filed; Plaintiffs' Motion to Compel Answers to Interrogatories filed; Plaintiffs' Motion to Compel Discovery and for Sanctions filed.

Local Rule 104.3 (D.Md.) provides in part: "Unless ordered otherwise by the Court, no discovery deadline will be extended because written discovery requests remain unanswered at its expiration." In this case, Plaintiffs could have requested an extension of the discovery deadline, but only did so once. On April 13, 1998--11 days after the discovery deadline--Plaintiffs filed a "Request for *Limited* Extension" (emphasis added) with regard to depositions which would take place after the discovery deadline. Plaintiffs did not request a modification of the scheduling order at that time.

The Court has reviewed the docket entries in this case, and concludes that Plaintiffs have failed to appreciate the nature of a "discovery deadline." Nevertheless, the Court must hold Plaintiffs to the same standard it uses to judge other litigants. In this case, all three of Plaintiffs' discovery motions were filed on May 22, 1998--fifty days after the discovery deadline of April 2, 1998. Prior to that date, Plaintiffs never filed a Notice of Service with regard to the motions to compel, as required by Local Rule 104.8(a).[1]

The motions which are now pending are untimely and will be DENIED. Cf. Ayala-Gerena v. Bristol-Meyers-Squibb Co., 95 F.3d 85 (1st Cir. 1996) (affirming the denial of Plaintiffs' Motion to Compel when motion was filed one-month late and when Defendant's Motion for Summary Judgment had already been filed); Dynamic Movers, Inc. v. Paul Arpin Van Lines, Inc., 956 F.Supp. 836 (E.D. Wisc. 1997) (denying motion to Compel filed two weeks after discovery deadline).

/s/

William Connelly
United States Magistrate Judge

Filed: May 29, 1998

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[1] Plaintiffs have apparently also overlooked the fifty-page limitation established by Local Rule 105.3

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Southern Division

Antonia M. Allen-Sesker, et al.,	*	
Plaintiffs	*	
v.	*	Civil Action No. PJM-97-2820
Bell Atlantic Enterprises International, Inc., et al.,	*	
Defendants	*	

ORDER

In accordance with the Court's Memorandum Opinion issued in this case, it is ORDERED:

(1) That Plaintiffs' Motion to Determine the Sufficiency of Defendant's Responses to Requests for Admission [Paper No. 39] be, and hereby is, DENIED;

(2) That the Plaintiffs' Motion to Compel Discovery [Paper No. 40] be, and hereby is, DENIED; and

(3) That the Plaintiffs' Motion to Compel and for Sanctions [Paper No. 43], be, and hereby is, DENIED.

/s/

William Connelly
United States Magistrate Judge

Filed: May 29, 1998

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
6500 CHERRYWOOD LANE
GREENBELT, MARYLAND 20770

MEMORANDUM

TO: Counsel of Record

FROM: Judge Peter J. Messitte

RE: Allen-Sesker, Inc. et al. v. Bell Atlantic Enterprises, Int'l, Inc., et al.

DATE: July 2, 1998

* * * * * * * *

Upon consideration of the Plaintiff Antonia M. Allen-Sesker's Objections to the Denial of Motion to Compel and Motion to Determine the Sufficiency of Defendants' Responses to Requests for Admission and the Defendants' Opposition thereto, this Court AFFIRMS Magistrate Judge William Connelly's denial of the motions.

Judge Connelly's denial of the untimely discovery motions is neither clearly erroneous nor contrary to law.

Despite the informal nature of this ruling, it shall constitute an Order of the Court and the Clerk is directed to docket it accordingly.

cc: Magistrate Judge Connelly

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ANTONIA M. ALLEN-SESKER, ET AL.,	*	
Plaintiffs	*	Civil No. PJM 97-2820
v.	*	
BELL ATLANTIC ENTERPRISES INTERNATIONAL, INC., et al.	*	
Defendants	*	

OPINION

I.

Plaintiffs, former employees of Chesapeake Directory Sales Company ("CDSC"), have sued Bell Atlantic Enterprises International, Inc., GTEX Corporation, and four individual defendants.[1] They allege discrimination in employment based on

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[1] The twelve Plaintiffs are: Antonia Allen-Sesker, Jacqueline Coleman, Charmaine Crawford-Holly, Belinda Dickens-Long, Tyo Hodgins, Barbara Lambright, Varnetta Moses, Gloria Real, Andri Stewart, Geraldine Stancil, Carol Willis, and Cassandra Grier. With the exception of one employee who is Hispanic, all of the Plaintiffs are African American.

The two corporate defendants--Bell Atlantic and GTEX--comprise a Maryland partnership that does business in the State as "CDSC," Plaintiffs' employer at all relevant times. The Corporate Defendants will be referred to

(continued...)

race (Counts I and II) and retaliatory discharge (Count III) in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000(e) et. seq., and breach of employment contract (Count V) in violation of the Civil Rights Act of 1991, 42 U.S.C. §1981.[2] Defendants have moved for summary judgment, to which Plaintiffs have responded by filing a Motion to Refuse Defendants' Application for Summary Judgment or in the Alternative Motion for Continuance. Upon consideration of the pleadings, the Court will: (1) DENY Plaintiffs' motions; (2) GRANT Defendants' motion; and (3) ENTER final judgment in favor of Defendants.

II.

CDSC, headquartered in Greenbelt, Maryland, sells and processes the advertisements found in Bell Atlantic's "Yellow Pages." At the time this lawsuit was filed, Plaintiffs-- all "at will" employees-- were among the approximately 120 Sales Production Coordinators ("SPC's") who worked in CDSC's Sales Production Department. Working out of headquarters, the SPC's were responsible for processing the advertising contracts obtained by the sales personnel in CDSC's eight regional Divisions.

In 1995, CDSC decided to disband the Sales Production Department, transferring the administrative responsibilities of the

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[1](...continued)
collectively as CDSC. The individual Defendants are Barry Van Ry, Stanley Haas, James Wallis, and E. Joseph Crosney.

[2] The Amended Complaint originally consisted of five counts. Count IV, alleging violation of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1001, et. seq., was dismissed by the Court as to all defendants on April 15, 1998. At the same time, Count V, alleging breach of contract, was dismissed as to all individual defendants and as to any contract claims that mirrored an ERISA claim. In addition, the Court dismissed the Title VII claims of plaintiffs Moses and Real.

SPC's to the newly-created positions at each of the eight regional Divisions. CDSC planned to eliminate the SPC positions completely by August 1997 and invited the existing SPC's to apply for new Account Quality Representative ("AQR") positions at the Divisions. By May, 1997, the transfer of the SPC's responsibilities to the Divisions was completed, but 21 of the original 120 Sales Production employees had not yet received new jobs. These employees were subsequently informed that their positions would be terminated as of August 15, 1997 and that they would be eligible for benefits pursuant to CDSC's Separation Pay Plan if they agreed to sign a release of claims. Plaintiffs, who comprised 12 of these 21 employees, declined the offer. This suit followed.

Before the Court, Plaintiffs claim that CDSC has engaged in a pattern of employment discrimination based on race. In addition to alleging that CDSC denied its African American and Hispanic employees equal wages, adequate training and equal opportunity for promotions, Plaintiffs claim that their positions were terminated not because of a necessary reorganization but for purely racially discriminatory reasons. They aver, for example, that white SPC's were automatically given new jobs at CDSC and not required to apply for new positions, whereas Plaintiffs were put through a discriminatory testing process and given false "feedback" to cover up the discrimination. When Plaintiffs complained about the discriminatory treatment, CDSC purportedly retaliated against them by refusing to provide them with medical coverage.

III.

On December 5, 1997, the Court issued a Scheduling Order setting April 2, 1998 as the deadline for discovery in this case. On April 2, 1998, Plaintiffs' counsel filed a Status Report with the Court stating that all written discovery had been served

and answered except for Defendants' responses to Plaintiffs' Request for production of Documents and that four depositions had not yet been conducted. That same day Plaintiffs filed a stipulation indicating that the parties had agreed to a "limited extension" of discovery to conduct the four outstanding depositions and that the "limited extension [would] not have an impact on the trial schedule." In neither Plaintiffs' Status Report nor the discovery stipulation did Plaintiffs identify the pendency of any discovery issues which might preclude the Court from considering dispositive motions.

On May 4, 1998--a full month after the close of discovery--Defendants filed a Motion for Summary Judgment. On May 15, in response, Plaintiffs filed a Motion for Extension to Respond to Defendants' Motion for Summary Judgment,[3] arguing that Defendants' failure to comply with discovery requests prevented Plaintiffs from adequately answering the Motion for Summary Judgment. On May 21, 1998--the deadline for Plaintiffs to file an opposition to the motion for summary judgment--Plaintiffs instead filed a Motion to Refuse Defendants' Application for Summary Judgment or in the Alternative Motion for Continuance.[4] In it, they reiterated their earlier arguments concerning Defendants' purported lack of compliance with discovery, citing Federal Rule of Civil Procedure 56(f) as grounds for a continuance.

During a May 22, 1998 conference call with counsel, Magistrate Judge Connelly granted Plaintiffs' Motion for Extension. In his written Order memorializing the call, Judge Connelly gave Plaintiffs until June 1, 1998 to file an opposition

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[3] Hereinafter "Motion for Extension."

[4] Hereinafter "Motion for Continuance."

to the Motion for Summary Judgment, explicitly warning Plaintiffs that no further extensions would be granted. Also on May 22, 1998, Plaintiffs filed a Motion to Determine the Sufficiency of Defendant's Responses to Requests for Admission, a Motion to Compel Discovery, and a Motion to Compel and for Sanctions. Noting that these motions were untimely--having been filed fifty days after the discovery deadline of April 2, 1998--Judge Connelly on May 29 denied all three.[5]

Thereafter, pursuant to Judge Connelly's Order of May 22, 1998, Plaintiffs filed their "Opposition to Defendants' Motion for Summary Judgment." But instead of substantively opposing Defendants' Motion, Plaintiffs merely repeated the arguments outline in their Motion for Extension and Motion for Continuance, stating that they "could not...file an Opposition to the Motion for Summary Judgment due to the lack of discovery responses," and indicating their intention to appeal Judge Connelly's denial of their discovery motions. Indeed, Plaintiffs thereafter did file their Objections to Judge Connelly's May 29, 1998 Order, which this Court, on July 2, 1998 overruled, affirming Judge Connelly's denial of the discovery motions. Currently before this Court, therefore, are Plaintiffs' Motion for Continuance and Defendants' Motion for Summary Judgment.

IV.

Summary judgment will be granted where the evidence, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue as to any material fact and the

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[5] Plaintiffs apparently served Defendants with the first Motion to Compel Discovery on February 12, 1998 and the second Motion to Compel on April 23, 1998. Inexplicably, however, the three motions were not filed with the Court until May 22, 1998. Moreover, prior to that date, Plaintiffs never filed a Notice of Service with regard to the Motions to Compel as required by Local Rule 104.8.

moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Matushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). Summary judgment must be refused "where the nonmoving party has not had the opportunity to discover information that is essential to his opposition." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). Federal Rule of Civil Procedure 56(f) permits a court to deny summary judgment or to order a continuance if the nonmoving party demonstrates through affidavits that it can not adequately oppose a motion for summary judgment without a chance to conduct discovery.[6] A nonmovant seeking a continuance pursuant to Rule 56(f), however, must file an affidavit showing "what specific facts he hopes to discover that will raise an issue of material fact." Finzel v. Mazda Motor of America, No. 98-

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[6] The relevant portions of Rule 56 read as follows:

> **(e) Form of Affidavits; Further Testimony; Defense Required**. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein... When a motion for summary judgment is made and supported as provided by this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does so respond, summary judgment, if appropriate, shall be entered against the adverse party.
>
> **(f) When Affidavits Unavailable**. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

1230, 1999 WL 12934 (4th Cir. Jan. 14, 1999).

V.

In view of Plaintiffs' failure to substantively oppose Defendants' Motion for Summary Judgment, the Court considers first whether a continuance pursuant to Rule 56(f) is warranted.

Plaintiffs contend that Defendants' refusal to cooperate with discovery has prejudiced their ability to respond to the Motion for Summary Judgment. In their Motion for Continuance, they argue that Defendants failed to respond to "numerous requests for production of documents and Requests for Admissions which are crucial in Plaintiffs' preparation for an adequate response to Defendants' Summary Judgment." An affidavit submitted by Plaintiffs' counsel and attached to the Motion for Continuance states that "Defendants have outstanding discovery documents that are critical to Plaintiffs' Opposition to Defendants' Motion for Summary Judgment." Another affidavit--styled as a "Rule 56(f) Declaration" and attached to Plaintiff's Opposition--refers to Defendants' refusal to disclose "important discovery."

None of the allegations made by Plaintiffs, however, "point to any specific facts that [they have] yet to discover." Finzel, 1999 WL 12934 at *3. This omission is fatal to Plaintiffs' argument. The Fourth Circuit has made pellucidly clear that a party employing Rule 56(f) to avoid summary judgment "may not simply rely on vague assertions that additional discovery will produce needed, but unspecified, facts." Id. at *2. (citing Nguyen v. CNA Corp, 44 F.3d 234, 242 (4th Cir. 1995); Sachs Corp. of U.S.A. v. United Virginia Bank, 97 F.R.D. 504 (E.D.Va. 1983) ("[F]urther discovery, although permitted in appropriate cases under Rule 56(f), is unwarranted...where it is clear that it would not be directed at filling a specific evidentiary gap, but rather would consist of blind groping..."). Despite being given more

than ample time to do so, Plaintiffs have filed to identify with any degree of specificity the facts which are allegedly so crucial to their case.

When they obtained an extension from Judge Connelly, Plaintiffs were explicitly warned that no further extensions would be allowed. After granting their Motion for Extension on May 22, 1998, Judge Connelly warned Plaintiffs to file an opposition to Defendants' motion by June 1, 1998. Judge Connelly made particular note of the fact that Plaintiffs' efforts to compel production of the alleged outstanding discovery were potentially fruitless, given the untimeliness of any motion to compel. From these bright red flags, Plaintiffs were unquestionably on notice that any failure to file a substantive opposition would be at their peril. Yet they failed to file. Indeed, in surprising disregard of Judge Connelly's order, Plaintiff proceeded to file three discovery motions which were ultimately denied by him on May 29, 1998. Even then, Plaintiffs' counsel had three days remaining until the June 1st deadline to prepare an opposition, but refused to act. While Plaintiffs may have believed that Judge Connelly's rulings were erroneous, by far the more prudent course would have been for Plaintiffs to prepare for the possibility that Judge Connelly's rulings would be affirmed--which indeed they have been.

Finally, the Court cannot help observe that--if it was there to be had--Plaintiffs must have received enough discovery to have at least filed *something* of substance in opposition to Defendants' motion. Shortly before the discovery deadline, in response to Plaintiffs' discovery requests, Defendants produced approximately 50,000 pages of documents. In addition, two dozen depositions had been conducted, including 13 depositions by Plaintiffs. Indeed, Plaintiffs indicated in both their Discovery Stipulation and Status Report that only a "limited extension" would be required to complete discovery. Plaintiffs' present

suggestion that they were "completely unable" to file a substantive opposition to Defendants' motion because of a lack of discovery is simply not credible.

VI.

For the foregoing reasons, the Court will DENY Plaintiffs' Motion to Refuse Defendants' Application for Summary Judgment or in the Alternative for Continuance. Furthermore, Plaintiffs having failed to substantively challenge any legal or factual argument raised by Defendants in their Motion for Summary Judgment, the Court will GRANT Defendants' Motion for Summary Judgment and enter a final judgment in favor of the Defendants.

A separate ORDER implementing this decision will be entered.

March 24, 1999

/s/

PETER J. MESSITTE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ANTONIA M. ALLEN-SESKER, ET AL.,	*	
Plaintiffs	*	Civil No. PJM 97-2820
v.	*	
BELL ATLANTIC ENTERPRISES INTERNATIONAL, INC., et al.	*	
Defendants	*	

FINAL ORDER

The Court having considered Plaintiffs' Motion to Refuse Defendants' Application for Summary Judgment or in the Alternative for Continuance, Defendants' Motion for Summary Judgment, and the record thereto, it is this 23 day of March, 1999,

ORDERED that Plaintiffs' Motion to Refuse Defendants' Application for Summary Judgment or in the Alternative for Continuance is hereby DENIED, and it is further

ORDERED that Defendants' Motion for Summary Judgment is hereby GRANTED, and it is further

ORDERED that FINAL JUDGMENT is hereby entered against Plaintiffs and in favor of the Defendants, and it is further ORDERED that the Clerk shall CLOSE this case.

/s/

PETER J. MESSITTE
UNITED STATES DISTRICT JUDGE

APPENDIX F

[UNREPORTED]
IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 99-1536

ANTONIA ALLEN-SESKER, *et al.*
Appellants,

v.

BELL ATLANTIC ENTERPRISES INTERNATIONAL, INC.
et al.
Appellees

OPINION

Before WILKINS, TRAXLER, and KING

PER CURIAM:

The Appellants appeal from the district court's order denying their motion for a continuance pursuant to Fed. R. Civ. P. 56(f) and dismissing their civil action alleging racial discrimination and retaliation in employment filed under 42 U.S.C. §2000e-2 (1994) and 42 U.S.C. §1981 (1994). The Appellants also assign error to the district court's order affirming the magistrate judge's denial of three discovery-related motions and the court's refusal to issue preliminary injunctive relief. Finding no reversible error, we affirm.

In light of the Appellants' failure to describe with any specificity the additional discovery required, we find that the district court did not abuse its discretion in denying the Rule 56(f) motion. See Nguyen v. CNA Corp., 44 F.3d 234, 242 (4th Cir. 1995). Neither did the court abuse its nearly "unfettered" discretion in denying Appellants' untimely discovery motions. Hinkle v. City of Clarksburg, 81 F.3d 416, 426 (4th Cir. 1996). To the extent that it may have been error to deny the Appellants' motion to determine the sufficiency of the Appellees' untimely response to the Appellants' request for admissions, we find that the error was harmless. See Fed. R. Civ. P. 61. See Beatty v. United States, 983 F.2d 908, 909 (8th Cir. 1993); Gutting v. Falstaff Brewing Corp., 710 F.2d 1309, 1313 (8th Cir. 1983).

Finally, we conclude that the district court did not abuse its discretion in declining to award preliminary injunctive relief to the Appellants. See Planned Parenthood v. Camblos, 155 F.3d 352, 359 (4th Cir. 1998) (en banc), cert. denied, --- U.S. ---, 119 S.Ct. 1031, 143 L.Ed.2d 40, 67 U.S.L.W. 3364 (U.S. Feb. 22, 1999) (No. 98-834).

The district court's orders are affirmed. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED.